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IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 79-1128

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents.

BRIEF OF AMICI CURIAE STATES OF WASHINGTON AND IDAHO IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. (a). Does an Indian treaty, which makes no specific reference to the ownership of the beds of navigable rivers running through an Indian reservation, impliedly deprive a subsequently formed State of the ownership of the river bed to which the State would otherwise be entitled under the equal footing doctrine, as reaffirmed in *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363?

(b). If, under such a treaty, the tribe acquired ownership of the bed of a navigable river, does such tribal ownership continue even after, pursuant to federal law, the lands abutting the river have been sold to non-Indians?

II. May a tribe, in the absence of authorization by either federal statute or treaty, regulate or prohibit hunting and fishing by non-Indians on lands within a reservation after such lands have been sold to non-Indians pursuant to federal law?

STATEMENT OF THE CASE

The facts involved are set forth in the Statement of the Case found in Montana's Petition for Certiorari. pp. 6-10.

It should be emphasized that about 30% of the Crow reservation lands have been sold to non-Indians—including lands abutting the Big Horn River.[1] Thus, along various parts of the river, the United States no longer owns the riparian land, either in trust for the Indians or otherwise.[2]

STATEMENT OF INTEREST OF AMICUS CURIAE

In the State of Washington there are 23 Indian reservations, with most having navigable rivers.

[1]These sales were made pursuant to the General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751.

[2]Just such a parcel was involved in *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), vacated 433 U.S. 676 (1977), a companion case to this one. James Junior Finch was arrested for casting his lure into the Big Horn River from the banks of riparian land owned by the State of Montana.

As this Court is already aware from prior cases arising in Washington,[3] much of the land on these reservations has passed into non-Indian ownership, just as has occurred on the Crow Reservation. This is the result of the federal policy embodied in various allotment acts, including the General Allotment Act of 1887. An extreme example of this result is the Puyallup Reservation in Washington, where there are only 22 acres remaining in Indian ownership, none of which are adjacent to the Puyallup River. See, *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 105, *"Puyallup III."*

In Washington, statewide, the non-Indian reservation population is approximately 58,000, while the Indian population is approximately 13,500.[4] This ranges from the Port Madison Reservation with about 3,000 non-Indians and about 50 Indians (see, *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978)) to the Quinault Reservation, which has very few resident non-Indians.

The major Indian reservations in Washington, with two exceptions, were created pursuant to the six "Stevens Treaties," with which this Court is

[3]See *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977) (Puyallup Reservation); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (Port Madison Reservation); *Washington v. Confederated Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (Yakima Reservation); *Washington v. Confederated Tribes of the Colville Reservation, et al.*, appeal pending, No. 78-360 (Colville, Lummi, Makah and Yakima Reservations).

[4]We would here emphasize and word "approximately." See Reply Brief for Appellants in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), p. 14, for the sources of these estimates. Exact figures are difficult to obtain, but these estimates are sufficiently reliable to show the pattern arising under the allotment acts.

familiar from the Puyallup cases and *Washington v. Washington State Commercial Passenger Vessel Association*, ... U.S. ....., 99 S. Ct. 3055 (1979).[5] Article II of the Stevens treaties is very similar to Article II of the 1868 treaty with the Crows. The Stevens treaties "reserve[d] for the * * * use and occupation of the said tribes and bands * * *" certain described tracts of land and provided:

> "* * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent."

No reference is made in the treaties to the rivers flowing within these tracts. The treaties are thus silent on the question of whether the Indians' right of "exclusive use" extends to the rivers.

The factual similarities between the situation on the Crow reservation and that on Washington's reservations, together with similarities in language between the Crow Treaty of 1868 and the Stevens treaties, underly the great practical importance of this case to the State of Washington.

To put the matter quite simply, if this attack by the United States and the Crow Tribe on Mon-

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[5] Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939; Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliott, 12 Stat. 927; Treaty of Point No Point, 12 Stat. 933; Treaty with the Quinaielts (Treaty of Olympia), 12 Stat. 971; Treaty with the Yakimas, 12 Stat. 951.

tana's ownership of the bed of the Big Horn succeeds, attacks on Washington's rivers will surely be forthcoming. If the Crow Tribe has the power to regulate hunting and fishing by non-Indians, on non-Indian reservation land, the Washington tribes will surely claim no less a power over non-Indians.

Our experience with the federal government and the tribes—experience with which this Court is familiar—leaves us little doubt that the rivers and non-Indian citizens of Washington State are high on the list of future targets.

The impact of the lower court's ruling in the State of Idaho would be similar to that in Washington. There are four Indian reservations in Idaho, two of which contain large amounts of land owned by nonmembers of the respective tribes. The Nez Perce Reservation contains approximately 756,000 acres, of which about 669,000 acres or 88.5% is owned by nonmembers of the tribe. The Couer de Alene Reservation contains approximately 345,000 acres of which approximately 275,000 or about 80% is owned by nonmembers of the tribe.

One of the State's most important river fisheries, the Clearwater River, runs across the northern and eastern portion of the Nez Perce Reservation. The boundaries of the Couer de Alene Reservation include several navigable bodies of water, such as the St. Joe River, Couer de Alene Lake (one of the three largest natural lakes in Idaho) plus the smaller

Benewah, Chalcolet and Hidden Lakes. The Blackfoot River forms a portion of the northeastern and northern boundaries of the Fort Hall Indian Reservation, with the Snake River forming the northwestern boundary.

If the decision of the court below is allowed to stand, it is probable that the Nez Perce and Couer de Alene Indians will assert claims to the beds of the navigable waters within their reservations. The possibility also exists that the Shoshone-Bannock Indians on the Fort Hall Reservation will assert claims to the beds of the navigable waters within their reservations, including the Snake and Blackfoot Rivers which delineate the reservation boundaries.

Further, as already noted, almost a million acres of land lying within Idaho's Indian reservations are owned by non-Indians. The rights of non-Indians in Idaho to hunt and fish on these lands are at stake in this case, just as in Washington and Montana.

DISCUSSION

I. OWNERSHIP OF THE RIVER BED.

We first take up the issue of the ownership of the river bed. The best starting point for putting this issue in focus is found in *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, *"Puyallup III"*; for a central issue in *Puyallup III* was the applicability of the "exclusive use" language of Article II to lands within the reservation and to the Puyallup River itself. As stated by the Court:

> "The Tribe vigorously argues that the majority of its members' netting of steelhead takes place inside its reservation.
>
> "* * *
>
> "Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was to be 'set apart, and, so far as necessary, surveyed and marked out for their exclusive use' and that no 'white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent.' It is argued that these words amount to a reservation of a right to fish free of state interference. Such an interpretation clashes with the subsequent history of the reservation and the facts of this case. Pursuant to two Acts of Congress, 27 Stat 633, and c 1816, 33 Stat 565, the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000-acre reservation. None of the 22 acres abuts on the Puyallup River.[12] Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use'." 433 U.S. 173, 174.

In footnote 12, the Court had more to say about the river:

> "Counsel for petitioner [Puyallup Tribe] intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr of Oral Arg 10. This contention is at odds with the otherwise uncontradicted findings below." [i.e., the findings that all but 22 acres had been alienated]

In short, the "exclusive use" language of Article II of the Stevens Treaties—and presumably the similar language of Article II of the Treaty with

the Crows—cannot be construed to create a legal Cheshire Cat. If the Tribe's trust status title to the riparian lands disappeared, trust status title to the adjoining river bed must have disappeared along with it: No legal "smile" remains.[6]

But this result, which was decreed by this Court in *Puyallup III*, is completely irreconciable with the result in the court below. According to that court, trust title to the bed of the Big Horn River remains in the Crow Tribe *even in those portions of the River where the abutting land has been alienated.* Though Article II of the Treaty with the Crows no longer applies to the abutting lands, it still somehow applies to the river bed. The smile of the Cheshire Cat remains hanging over the Big Horn River, though it ceases to hang over the Puyallup.

We need hardly point out the confusion created by these conflicting results. And if this Court does not dispel that confusion by reviewing this case, we fear that the confusion will become worse compounded by litigation that will surely be forthcoming.

The result in *Puyallup III* could have been reached by another route, not there presented, which is, however, the major issue presented here. The issue, simply put, is this: Does Article II of the Crow

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[6]And accordingly, the State would now have title to the river bed. For now the "exclusive use" language of Article II, being no longer applicable, would not prevent the application of the equal footing doctrine. The title of the navigable river would be in the State, rather than in the riparian owner.

and Stevens treaties apply to navigable rivers so as to deprive the State of title to the river beds as an initial matter?

In contrast with *Puyallup III*, that issue must be addressed here; for some of the riparian lands along the Big Horn River are still held by the United States in trust status for the Crow Tribe.

There is no question that the bed of the Big Horn River is now in some type of trust status, and, indeed, always has been in such a status since the United States first laid claim to the geographical area now encompassed by the State of Montana. The question is: Who is the trustee? And, even more importantly, who are the beneficiaries?

Under the equal footing doctrine, as reaffirmed in *Corvallis Sand and Gravel Co.*, 429 U.S. 363, the United States holds the title to the beds of navigable rivers within a territory, in trust for the future State to be formed from that territory. The State, in turn, acquires title to those beds upon admission to the Union. The title of the State, however, is itself that of a trustee; it is the American counterpart of the King's title to navigable waters in England under the common law. Title is held by the State—and the King—for the benefit of the public generally, for purposes of navigation and the like. After all, that is why the equal footing doctrine applies only to *navigable* rivers, and not to all watercourses generally. See *Shively v. Bowlby*, 152 U.S. 1 (1894).

Did Article II of the treaty with the Crows intend to arrest the operation of the equal footing doctrine, and thereby cut off the right of the public generally to use navigable rivers running through the reservation? Was the exclusive right of use of these rivers vested in the Indians?

The question of who owns the river bed really turns on the question of who was intended to be able to use the river itself. What was at stake in 1868 is the same thing now at stake in 1980: The right of the public to use the river for those purposes which the equal footing doctrine, as applied to navigable rivers, was designed to protect.

It is no answer to assert that the public's right of navigation is protected through the federal navigational servitude arising under the Commerce Clause. Cf., *Gibson v. United States*, 166 U.S. 269, 271-272. Surely Article II must mean the same thing when it speaks to the federal government as when it speaks to a State. If Article II vests in the Indians the sole use of the navigable river, to the exclusion of all others, the doctrine establishing an implied navigational servitude certainly must be arrested just as effectively as the equal footing doctrine.

This does not mean, however, that the Indians are precluded from having any special rights to the use of the waters of a navigable river. For example, when a tribe has a treaty right to withdraw water from a navigable river to irrigate the reservation

land, the ownership of the river bed by a State does not defeat that right. *Arizona v. California*, 373 U.S. 546, 597. A tribal water right is implied from the purpose of the reservation, but is limited to the amount needed to fulfill that purpose. It is not a right to use every drop of the water simply because it flows across the reservation. *Arizona v. California, supra.*

We see no reason why the right to take fish out of the river cannot be treated in the same manner as the right to take water. That right too can be implied, even though the State owns the river bed.

What *cannot* be implied, however, is the tribal right to the river bed itself, and the consequent right to shut off public navigation on a navigable river.[7]

II. TRIBAL CONTROL OF NON-INDIAN HUNTING AND FISHING.

Although the lower court rejected the tribe's assertion that it could *entirely* prohibit hunting and fishing by non-Indians, it did leave the tribe with very substantial regulatory power over non-Indian hunting and fishing. The court lifted the prohibition only for a resident non-Indian on his own non-Indian owned land. Tribal authority was still found to prohibit a non-Indian owner who was not a resident,

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[7]The obvious should not be overlooked. Navigable rivers were arteries for the settlement of the West. This Court apparently had this fact in mind in *United States v. Holt State Bank*, 270 U.S. 49, wherein it emphasized the fact that the lake there involved was part of a river system which provided a means of transportation all the way to Canada.

guest of the owner, and even a resident non-Indian upon a neighbor's lands, from hunting or fishing. Moreover, the tribe still has the power, under the lower court's ruling, to regulate (but not to prohibit) hunting and fishing by non-Indian residents on the land on which they reside. This tribal power is concurrent with State power, and in case of any conflict between the two, the more restrictive regulation will control.

But is there a source for this tribal power and, if so, what is it? That is the critical question presented by this aspect of the case. And that is the question this Court should answer.

The source cannot be found in any federal statute. The provisions of 18 USC § 1165 are, by the express terms of the statute, confined to hunting and fishing on *Indian* lands. Nor can the source be found in any treaty provision.

As this Court held in *Puyallup III*, the exclusive use language of Article II of the Stevens treaties, which parallels the 1868 Crow treaty, no longer applies to lands which have been sold to non-Indians. Accordingly, how can such tribal power be found in the similar language of Article II of the 1868 treaty with the Crows?

Nor can such tribal power be found in Article IV of that treaty. That article confers "* * * the right to hunt on the unoccupied lands of the United States. * * *" But the lands in question no

longer belong to the United States; they have been sold to non-Indians.

Further, even if the tribe continues to have fishing and hunting rights on these non-Indian lands, it does not follow that the tribe also has the power to regulate non-Indian hunting and fishing on these lands.

To illustrate this point: Every single part of Puget Sound, in the State of Washington, is subject to treaty fishing rights of one or more Indian tribes. *Washington v. Washington State Commercial Passenger Vessel Association, supra.* That certainly does not mean, however, that the Washington tribes can take over the functions of the Washington State Department of Fisheries and regulate the activities of non-Indian fishermen on Puget Sound.

What the tribes can do, however, is precisely what they did in *Washington v. Washington State Commercial Passenger Vessel Association, supra;* they can require the State agency to regulate the non-Indians in a manner which accommodates the treaty rights of the Indians, and allows them the full exercise of those rights. But those rights do not confer on the Indians governmental power over non-Indians.

Once again, the court below has conferred upon an Indian tribe a power over non-Indians which has no legal basis. See, *Oliphant v. Suquamish Tribe,* 544 F.2d 1007 (9th Cir. 1976), reversed 435 U.S. 191

(1978). The impact of this error by the lower court will be felt by every mainland state within the Ninth Circuit, for they all contain Indian reservations. That error should be corrected by this Court, just as it was in *Oliphant*.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

DATED this 25th day of February, 1980.

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